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No. 85-429
No. 85-430

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

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QUESTION PRESENTED

Whether existing law imposes any restraints or guidelines on a court's power to effect restitution beyond requiring the defendant to forfeit his unjust enrichment.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute (API) submits this brief *amicus curiae* in support of the petitions for writ of certiorari filed by Exxon Corporation, No. 85-429, and Marathon, *et al.*, No. 85-430.

INTEREST OF THE AMICUS CURIAE

API is a trade association representing approximately 215 member companies and 8,000 individual members. API's members are engaged in all facets of the petroleum industry including the production, refining, and market-

ing of crude oil and refined petroleum products. Throughout the time periods involved in this case, API members were subject to the price and allocation laws and regulations adopted by the Congress and the Department of Energy (and its predecessor agencies) governing the sale and distribution of crude oil and petroleum products.

API members have a direct interest in the remedy entered and affirmed by the lower courts disposing of almost $2 billion for alleged overcharges associated with the sale of crude oil produced from the Hawkins Field. By affirming the district court's award of all alleged overcharges to the states in accordane with Section 155 of the Furthering Continuing Appropriations Act of 1983, commonly known as the "Warner Amendment," Pub.L. No. 97-377, §155, 96 Stat. 1830, 1919 (1982), the Temporary Emergency Court of Appeals (TECA) categorically and arbitrarily denied members of the petroleum industry, including many API members, their due process rights to demonstrate they were entitled to receive a portion of the refund.

The decision below is troubling in several other respects to industry at large, particularly insofar as it enforces a regulatory interpretation that was expressly repudiated by DOE, subjects a firm to retroactive application of a rule that was not intended to be retroactive, enforces unjust and discriminatory classifications among crude oil producers, and permits DOE to ignore its own rules, as set forth in the petitions.

API files this *amicus curiae* brief, however, for the limited purpose of asking the Court in particular to rectify the unfair and unprecedented denial of the legal rights of its members with respect to the issue of remedy – a matter which unquestionably affects their economic interests.

ARGUMENT

On July 1, 1985, a majority of the Temporary Emergency Court of Appeals (TECA) affirmed a District of Columbia U.S. District Court holding that Exxon Corporation had violated the Department of Energy's two-tier crude oil price regulations, 10 C.F.R. §§212.73, 212.74 (1975). *United States v. Exxon Corp.*, 4 ENERGY MGMT. (CCH) ¶26,539 (TECA July 1, 1985). TECA also affirmed the District Court finding that Exxon was liable in restitution for $1.6 billion in overcharges and interest and that court's award of the refund to the states for distribution by them.

The lower courts entered a remedy in flagrant disregard of controlling legal precedent. The TECA majority opinion assumed that a court's restitutionary duty begins and ends when it requires a defendant to forfeit his "unjust enrichment." This assumption ignored the decisions of this Court addressing the restitutionary powers and duties of the judiciary, and instituted a remedy that suggests the courts possess unbridled restitutionary powers.

The comprehensive dissenting opinion filed by Judge Becker of TECA provides a textbook analysis of the applicable law on the restitutionary authority of the courts, the notice and hearing required by due process before distribution of a court-created fund, intervention and interpleader and the inappropriateness of reliance on the Warner Amendment in the instant case. When this thorough dissent is contrasted with the TECA majority opinion and the stark lack of legal analysis therein, it seems quite apparent that error was committed below.

This Court has articulated some specific principles to guide courts in restitution cases similar to the case at bar. The Court below made no attempt to comply with those

decisions. Instead, it assumed it was under no duty to undertake any type of systematic inquiry with respect to the determination of the identity of those suffering losses as a result of the alleged wrongful acts and affirmed a restitutionary remedy on summary judgment despite the existence of contraverted issues of material fact.

This Court should review the lower court's cavalier disregard of judicial responsibility in effecting restitution. We believe this Court should remand this case with an opinion that will ensure that the huge sums at issue here, and funds which may be distributed in future cases, are handled in a systematic and equitable fashion that will more nearly accomplish a return to the status quo — which is one of the basic objectives of the restitution doctrine.

I. THE TECA MAJORITY ENTERED A REMEDY CONTRARY TO THE CONTROLLING LAW OF RESTITUTION AND WITHOUT PROVIDING TO POTENTIAL CLAIMANTS NOTICE AND AN OPPORTUNITY TO BE HEARD

The judicial power to order restitution arising from alleged price control violations is found at Section 209 of the Economic Stabilization Act, which authorizes the Courts to ". . . order restitution of moneys received in violation of any such order or regulation." 12 U.S.C.A. §1904 note (1980).

The dissenting opinion filed by Judge Becker demonstrates, by surveying the controlling law on the judicial duty and power to order restitution, that the federal courts have comprehensive equitable power to order restitution, but that power is not totally unlimited. 4 ENERGY MGMT. (CCH) ¶26,539 at 26,433. The cases cited by Judge Becker also describe the *nature* of that equitable restitutionary

power. *Id.* at 26,433-439. Having described the nature of the courts' restitutionary powers, Judge Becker then concludes that potential claimants to the fund created by the court have a protected property right to restitution of damages, and further, that the Due Process clauses of the Fifth and Fourteenth Amendments require some form of hearing before depriving those parties of their property interest. *Id.* at 26,444-447. API submits that when Judge Becker's analysis of the controlling precedents is contrasted with the conclusions reached by the majority opinion, it is apparent that the majority completely disregarded the applicable law articulated by this Court.

A. CONTROLLING DECISIONS DEMONSTRATE THAT TECA IN EFFECTING RESTITUTION SHOULD HAVE ATTEMPTED TO RESTORE THE STATUS QUO AND TO GIVE EFFECT TO THE STATUTORY PURPOSES

Although the cases cited by Judge Becker stand for the proposition that the courts possess broad equitable powers to effect restitution, those cases clearly articulate guidelines for the courts to follow in restitution cases. Most notably, this Court has stated that a court in equity may give "*complete relief in light of the statutory purposes.*" *Mitchell v. De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (emphasis added). This Court has set forth two important principles which are to govern judicial restitution in price control regulatory programs. First, the remedy must "protect the public interest while giving necessary respect to the private interest involved." *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Second, the restitution order should "enforce compliance with the Act" and "give effect to its purposes." *Id.* at 400. These principles are satisfied when the courts act "by restoring the status quo

and ordering the return of that which rightfully belongs to the purchaser or tenant." *Id.* at 402. The notion that a court in effecting restitution should attempt to restore the status quo was echoed in *Federal Power Comm'n v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949), wherein Justice Douglas indicated that the Court's duty in administrating a fund of rate overcharges was to "undo the wrong" by identifying those who had suffered a loss. Justice Douglas stated:

> In conclusion, the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But the federal court must make its prognostication, whether an excursion into federal or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterized the administrative process.

Id. at 584.

In sum, the law of restitution as enunciated by this Court suggests that two principles should guide the courts in effecting restitutionary remedies in analogous cases. First, it is the responsibility of the court to attempt to restore the status quo, *Interstate Natural Gas*, 336 U.S. 577, and second, the court should attempt to effect the purposes of the underlying statute, *United States v. Morgan*, 307 U.S. 183 (1939). The TECA majority disregarded both principles.

1. TECA Disregarded Its Duty to Restore the Status Quo

In stark contrast to the principles enunciated by this Court, the TECA majority concluded it was under no duty to reestablish, or even attempt to reestablish, the status quo. TECA premised that conclusion on the assumption that such a task would be "impossible," without the benefit of any evidence to prove or disprove that ascertaining and compensating injury would in fact be "impossible." The court said:

> "[T]here was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products."

United States v. Exxon Corp., 4 ENERGY MGMT. (CCH) ¶26,539 at 26,427. The TECA majority determined its only duty in effecting restitution to be:

> "to determine the amount by which the wrongdoer has been unjustly enriched and then to make him disgorge that amount. *No proof is required that the plaintiff was damaged, much less the amount of any damage."* (emphasis in original).

Id. at 26,425 *citing Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717, 722 (TECA 1982), *cert. denied,* 459 U.S. 877 (1982). TECA thus determined that its only duty in effecting restitution was to ascertain the amount of the defendant's "unjust enrichment" and force him to disgorge that amount, without regard to the identity or extent of injuries sustained as a result of the alleged wrong.

2. TECA Failed to Give Effect to The Statutory Purposes

TECA also entered a remedy that fails to comport with this Court's requirement that a fund should be distributed in accordance with the purposes of the underlying statutes. *Porter,* 328 U.S. at 400. The Economic Stabilization Act, 12 U.S.C.A. §1904 note (1980), sought to stabilize prices, especially those associated with crude oil and petroleum products, for all sectors of the economy, and to maintain and promote competition within the petroleum industry. The Emergency Petroleum Allocation Act as amended by the Energy Policy and Conservation Act, 15 U.S.C.A. §751 *et seq.* (1982), recognized the need to fairly distribute crude oil and refined products throughout the petroleum industry and to allow members of the industry to recoup appropriate costs. In short, these Acts, together with the federal regulatory programs implementing their provisions, were designed to benefit the entire American economy, public and private. Nothing in these Acts suggested that individual consumers as a class were *per se* to be protected over other groups. Instead, the programs were intended to work by calling for "generally comparable sacrifices by business and labor as well as other segments of the economy." ESA Section 203(b)(5), 12 U.S.C.A. §1904 note (1982).

API maintains that the method for allocating these "sacrifices" among all segments of the economy was decided by DOE and reflected in the framework of the DOE regulations. Therefore, in order to carry out the statutory purpose the lower courts were required to make a realistic attempt to use these regulations. Instead, the TECA majority arbitrarily dismissed their use as "futile" and distributed the funds to the states for the benefit of a special class of consumer. Though such persons were pro-

tected by the statutes and regulatory program, they were no less protected than any other aggrieved group, including members of the petroleum industry. API submits that to the extent a party absorbed a loss attributable to the alleged overcharges, he or she was within the scope of congressional concern and is a candidate to qualify for a portion of any restitutionary award. Such an award would be consistent with the public and the private interests identified in these statutes and the underlying regulatory program.

The remedy chosen by TECA, instead of resting upon established equitable principles, is premised upon the unsupported judgment that the petroleum industry passed through the alleged Hawkins Field overcharges to ultimate consumers. By thus eschewing the systematic guidelines of this Court and awarding the money at issue to the states on the basis of its assumptions about industry practice, TECA has endorsed extreme judicial activism. The judicially legislated remedy has established questionable precedent for future refund cases. The opinion suggests a policy whereby once a defendant has been divested of alleged "unjust enrichment," a court is free to award the fund to whomever it chooses, without conducting any inquiry into who suffered loss. The courts thus would have seemingly unbridled discretion to act in the public interest* when effecting restitution.

If the restitutionary principles enunciated by this Court are ignored, then no restraints check the restitutionary

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*For a complete discussion of why the remedy selected by TECA was not in the public interest, see Judge Becker's discussion of the inappropriateness of relying on the Warner Amendment. 4 ENERGY MGMT. (CCH) ¶26,539 at 26,455.

powers of the courts. Review of this case will ensure that the substantial sums of money involved in this and other pending DOE price control cases are properly distributed as intended by Congress.

B. THE TECA MAJORITY OPINION DEPRIVES INJURED PARTIES OF DUE PROCESS WITHOUT ANY FORM OF NOTICE AND HEARING

As Judge Becker noted in his dissenting opinion, the right to restitution of damages caused by an alleged violation of law is a property right under the Due Process clauses. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Accordingly, the Constitution requires at a minimum notice and an opportunity for comment appropriate to the case. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

The remedy entered by the district court denied all potential claimants to the restitutionary fund an opportunity to come before the court to be heard. Moreover, the briefing opportunity parties had before TECA cannot be said to have cured the denial of due process:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972). In *Porter v. Warner*, this Court indicated that the judiciary has "inherent power to bring all the interested parties and settle the controversies. . ." 328 U.S. at 403. This comports with the Court's action in *Central States Electric Co. v.*

City of Muscatine, where the fund was ordered to be held a "reasonable time to permit interested pesons to litigate the issue in a tribunal having jurisdiction. . .", 324 U.S. 138, 146 (1945). Distribution of a fund should not involve prolonged litigation, *Interstate Natural Gas,* 336 U.S. at 584, but neither should it ignore procedural due process guaranteed under the Fifth Amendment. Time limitations, special masters, and other administrative devices were available to the district court to expedite the case and still afford parties their constitutional rights.

II. SUMMARY JUDGMENT WAS IMPROVIDENTLY GRANTED BECAUSE ISSUES OF MATERIAL FACT WERE IN DISPUTE

A. MATERIAL FACTS WERE IN DISPUTE

The District Court concluded categorically that only consumers of petroleum products bore the alleged Hawkins Field overcharges. *United States v. Exxon Corp.,* 561 F. Supp. 816, 853 (D.D.C. 1983). Without the benefit of any briefing or evidence, the Court held that the incidence of the presumed injury could not be ascertained and compensated. The TECA majority opinion takes a slightly different approach. Using the same incomplete factual record before the district court, the TECA majority describes in detail how difficult it would be to determine who had borne the alleged overcharges. "Futility," however, is not a legal question, it is one of fact. Although the TECA majority opinion admits the possibility that many different parties could have absorbed the alleged overcharges, including resellers, retailers, and consumers, it merely concludes it is under no duty to determine who sustained injury and affirmed the granting of summary judgment.

Summary judgment as a matter of law should be granted only when no genuine issue as to any material fact remains for trial. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); FED.R.CIV.P. 56. The moving party carries the burden of showing the absence of genuine issue as to any material fact and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

API submits that at least three material facts are clearly in dispute: (1) who absorbed the impact of the alleged Hawkins Field overcharges; (2) in what amounts; and (3) whether it is impossible to find a way to compensate.

The TECA majority and the District Court's assertions of the "impossibility" of answering these questions is belied by a number of sources. API asks this Court to take judicial notice of information contained in letters written on September 3 and 23, 1985 by Representative John D. Dingell, Chairman of the House Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. The letters show that DOE's Office of Hearings and Appeals concluded not only that identification of persons injured by crude oil overcharges was possible, but that it was possible to implement an "administratively workable" restitutionary mechanism. Appendix I, II. These conclusions are in direct conflict with the position urged upon the court by DOE, namely that identifying and compensating injured parties was a "futile" task. In addition, in the petition of Marathon, *et al.*, No. 85-430, for writ of certiorari before this Court, there is factual evidence which parties are prepared to present which demonstrates who absorbed the alleged overcharges in the sale of both controlled and decontrolled petroleum

products. Thus, TECA accepted on summary judgment the government's contention that it is "impossible" to ascertain who is injured by crude oil overcharges, despite evidence that OHA concluded it is practicable to do so. TECA's refusal to even attempt to explore factual material which is relevant in identifying and compensating parties suffering loss is reversible error.

B. THIS COURT HAS FOUND THAT COMPLEX ISSUES SHOULD NOT BE DECIDED ON AN INADEQUATE RECORD

There can be no doubt that summary judgment must be denied when there are material issues of fact in dispute and that the moving party has the burden of showing a lack of a dispute. 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.15[3] (2d ed. 1985). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). This Court though, has also recognized the need for a fully developed record in cases involving complex issues of public importance. Such is the duty of a court in order to effect sound judicial administration. In a case which present analogies to the instant case, this Court in *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), vacated a lower Court's grant of summary judgment for this reason. Justice Jackson stated that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import. . ." *Id.* at 256-57. Moreover, in words applicable to this case, he indicated that even if the record before the court could support issuing a summary judgment, good judicial administration demanded that the motion be denied in certain instances:

> We consider it the part of good judical administration to withhold decision of the ultimate questions involved in this case until this or

> another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

Id.

In short, even in instances where there is some question regarding the materiality of contraverted facts, where the total complexity of the issues raised, both legal and factual, would benefit from the taking of additional evidence or argument, it is an abuse of a court's discretion to render a summary judgment.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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December 23, 1985

APPENDIX I

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

September 3, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
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Dear Mr. Boggs:

Thank you for your August 20, 1985 reply to my letter of July 30 in which I expressed considerable disagreement, based on the record of investigations by this Subcommittee and the General Accounting Office (GAO), with the June 21, 1985 "Statement of Restitutionary Policy" issued by you in conjunction with the issuance by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) of its June 19 report concerning the *Stripper Well* litigation.

It is disturbing that you and the DOE counsel do not want to present to the court a complete story concerning DOE's restitutionary practices, together with the views of the Chairman of the House Committee with legislative and oversight jurisdiction over your Department and this program. Presenting one side only misleads the court and could cause the court to decide on the mistaken belief that

Congress and the DOE are in accord in this matter. I urge you to reconsider this matter before September 16.

As part of your reconsideration, I urge you to consider the following comments.

As you know, as long ago as March 14, 1985 I wrote to the Secretary of Energy (copy enclosed) about the OHA report and expressed concern about the status of the OHA report. In that letter, I said:

> If, despite this letter, anyone at DOE reviews or coordinates the OHA report, the Subcommittee expects to receive from OHA not only the final version, but also the OHA draft version, and from the DOE, the identity of all persons inside or outside DOE who reviewed the OHA draft report. No one should destroy the evidence this time.

After receiving an April 12 reply from Mr. Rayburn Hanzlik in which he indicated that an "internal review process' of the OHA report would take place at the DOE, I again wrote to the Secretary on April 9 (copy enclosed). I said:

> Subcommittee specifically reiterates its earlier request that each draft of the report (including any recommendations) that is made available to *anyone* outside of OHA be retained and provided to the Subcommittee after the report is issued.

I subsequently learned through our investigation of this matter that a draft report was prepared by OHA and given, as part of the "internal review process" dictated by DOE officials, to several such officials in early April. I also learned that DOE officials met in April and early May regarding this report. At those meetings, these officials made their views known to the OHA about the report.

Subsequently, the DOE received an order dated May 7, 1985 from the court confirming the claims in my March and April letters, that this was to be a report by OHA, not DOE. Accordingly, on June 13, 1985 Secretary Herrington wrote (copy enclosed) assuring me that DOE will comply with the court's order. He said:

> OHA will report the results on its fact-finding on the tracing of the overcharges without editing or modification by other parts of the Department. The Department will also provide its recommendations to the court, but the exact way in which this will be done has not yet been finally determined.

Unfortunately, as I show in this letter, the damage was done *before* issuance of the court's order. The OHA had been beaten into submission by the "internal" process described by Mr. Hanzlik. Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

When the report was issued in June, Mr. James U. DeFrancis of the DOE provided a copy to the Subcommittee by letter of June 24. On July 30, I wrote Mr. DeFrancis (copy enclosed) thanking him for the report and reminded the DOE of my earlier request for copies of the draft OHA report and the identity of the officials outside OHA who received that draft. On August 20 the OHA wrote to me "in response" to my letter to Mr. DeFrancis and provided a copy of the draft report.

The OHA said:

> Only one draft was circulated to persons outside of the Office of Hearings and Appeals. On April 1, 1985, we provided five copies of this

> draft to the Administrator and Deputy Administrator of the Economic Regulatory Administration. Subsequently, we supplied one copy of the draft to the Assistant Secretary for Congressional, Intergovernmental and Public Affairs. We understand that ERA subsequently provided copies to the Office of General Counsel and to the Deputy Secretary.
>
> A copy of this draft is enclosed. The information contained in this document is of a sensitive nature, representing the predecisional processes of the agency, and is exempt from mandatory public disclosure pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. Sec. 552(b)(5). We request that the Subcommittee exercise special care in the storage and handling of this draft to ensure its confidentiality and to protect against disclosure.

Let me state first that I disagree with the DOE claim of exemption from public disclosure, as this report was always to be a reply to a court order. *No* agency "predecisional process' was intended by the court (as is clear by the court's May 7 order although the DOE and OHA *improperly* went thru such a process prior to the May 7 order. Indeed, there never should have been any such "internal review process". No DOE policy was involved. DOE was free to adopt whatever policy, position, or decision it wanted separate from the court-ordered report. The Freedom of Information Act was not intended to exempt from disclosure documents of this nature. The OHA misapplies the Act in this case.

In regard to the draft OHA report, it is substantially different in content, substance, and tone (from introduction to end) from the final OHA report. Indeed, the very first

paragraph of the "Introduction" of the draft report differs (after the second sentence) from the public report.

The public report states:

> On May 7, 1985, the District court issued an order which clarified the manner in which the fact-finding report from OHA was to be submitted. *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL. No. 378 (D. Kan., May 7, 1985) (order denying motion to expedite issuance of OHA's report).
>
> In that decision, the court ordered the OHA to issue its findings of fact of the tracing and impact of the overcharges in one separate report without editing or modification by the DOE. *Id., slip op.* at 7. Recognizing that the DOE's position on the utility of further efforts by the OHA and a recommended plan of restitution was a matter of agency policy, the court directed that these concerns be addressed in a second report "which shall be issued separate from the report of the OHA's fact-findings." *Id.* This report sets forth the OHA's analysis and findings of fact regarding the absorption of the impact of these crude oil overcharges by the U.S. domestic refining industry.

The report states:

> This report sets forth findings of fact regarding the absorption of the impact of crude oil overcharges by the U.S. domestic refining industry. The ultimate conclusion is reached that members of the refining sector of the domestic petroleum industry absorbed a portion of the overcharges and should be compensated. It also includes recommendations for a restitutionary

> mechanism which can be implemented efficiently. The refund mechanism which is recommended to the court would apply to refiners, other Entitlements Program participants, and consumers of refined petroleum products, such as utilities and airlines, that purchased product directly from refiners. It does not cover resellers or purchasers of products from resellers.

Most importantly, the OHA Findings of Fact set forth in the public report differ from those in the non-public draft. Further, a whole chapter entitled "V. Standards for the Fact-Finding Process' is omitted in the final report. In addition, the public report ends with the Findings of Fact, i.e. chapter VI. The draft report does not. It includes another chapter entitled "VIII. Recommendation of Restitutionary Mechanism."

All of these changes were apparently made as a result of the negative attitude expressed by DOE officials, such as yourself, after April 1 to the draft OHA report as part of DOE's improper "internal review process". OHA, which, of course, is *not* truely independent of the Deputy Secretary, the General Counsel or other DOE officials, apparently carved under the pressure exhibited through this negative attitude of DOE officials and re-wrote the drft to de-tone it, eliminate two whole chapters, and *change the findings.* The very thing I feared and predicted in my correspondence in March and April occurred. In my view, that action (under your auspices and other DOE officials was in violation of both the spirit and words of both court orders.

The OHA was not allowed to be a free agent. Indeed, OHA personnel were, as expected, "good soldiers" and adhered to the DOE policy-line, i.e. bring this program to

an end, do nothing to require more resources that could extend the program, and most importantly, use these funds to reduce the Federal budget deficit in the name of restitution. OHA had no choice because OHA lacked support at DOE for a refund policy.

I again request that you provide before September 16 a copy of my letter of July 30 to the court, together with this letter, and a copy of the OHA draft report.

Such disclosure is necessary not because the final report failed to include OHA's draft Chapter VIII, although I believe it properly should have been included because (despite OHA's mistaken characterization of the chapter as "policy") it informs the court on how to implement an administrative refund process, but because the fact finding of OHA was changed even slightly and a whole chapter relating to that fact finding was deleted after the OHA released the report to you and other DOE officials. Once that change occurred, the report lost its character as an OHA report, even though the mechanics of change were undoubtedly done by OHA and not the DOE officials. The DOE officials' interference did not stop at chapter VIII. It extended to the body of the report and the Findings of Fact. The court needs to be aware of this. Even with this knowledge, the court may adopt your policy. But without it, the court will be misled by the public report.

In addition, I request that you provide:

(a) a list of *all* persons within DOE (other than OHA) and at other agencies who received a copy of the April 1 draft or any later draft,

(b) a list of the dates of all meetings concerning this report and the identity of the participants,

(c) an explanation why the assurances provided by

the Secretary to me were apparently ignored by DOE officials in regard to this draft, and

(d) a copy of all memoranda, notes, and other documents (including marginal notes on each copy of the draft) prepared by DOE officials outside OHA regarding this report.

In conclusion, it is not my intention at this time to release this draft report. I believe that the OHA and DOE has an obligation to do so. But I will consider that view, depending on your response to me, after September 16. I understand that the court has set September 22 as the next date for briefing on these matters. Clearly, the court should be informed of these matters by then.

Sincerely,

JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosures (4)

cc: Honorable Philip R. Sharp, Chairman
Subcommittee on Fossil and Synthetic Fuels

Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power

Honorable James T. Broyhill, Ranking Minority Member
Subcommittee on Oversight and Investigations

Honorable James A. McClure, Chairman
Senate Committee on Energy and Natural Resources

Honorable J. Bennett Johnston, Ranking Minority Member
Senate Committee on Energy and Natural Resources

Honorable William H. Gray, III, Chairman
Committee on the Budget

Honorable Sidney R. Yates, Chairman
Subcommittee on Interior and Related Agencies

Honorable John S. Herrington, Secretary
Department of Energy

Honorable Joseph R. Wright, Jr., Acting Director
Office of Management and Budget

Honorable Charles A. Bowsher, Comptroller General
General Accounting Office

Honorable John Carlin, Chairman
National Governor's Association

Honorable Francis X. Bellotti
Attorney General of Massachusetts
President
National Association of Attorneys General
444 North Capital Street, N.W., Suite 403
Washington, D.C. 20001

Honorable Rayburn Hanzlik, Administrator
Economic Regulatory Administration
Honorabled George B. Breznay, Director
Office of Hearing and Appeals
Department of Energy

APPENDIX II

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, D.C. 20515

September 23, 1985

Honorable Danny J. Boggs
Deputy Secretary
Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Boggs:

Except to the extent your September 19, 1985 reply to my September 3 letter identifies the numerous persons (outside the Office of Hearings and Appeals (OHA)) who were given copies of the April 1, 1985 OHA draft *Stripper Well* report and lists some of the "numerous meetings" by you and others in the Department to "discuss the Report and the Statement of Restitutionary Policy", your letter is somewhat misleading. Let me explain why I believe that to be the case.

First, you agree that the final OHA report and the April 1 draft "differ" in tone, but you contend that the "substance of the factual findings is exactly the same." Your interpretation and mine of what is encompassed by the word "substance" may differ. However, I believe it relevant to point out that the "words" and "emphasis", not just "tone", were changed significantly. For example, the publicly released June 1985 report states (pp. 77-78):

Each of the methods presented for determining who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods – refiner-per-barrel profit analysis – is not relied upon in this Report, except as part of the "big picture." The other – an analysis of refiner cost banks – is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. Although marginal economic analysis rests upon assumptions and estimations, we find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers an appropriate question, namely, to what extend did product prices rise when the refining industry experienced small crude oil cost increase. It does not, however, answer the question with respect to any particular firm. As noted previously in this report, to determine the extent to which a particular refiner passed through the impact of the MDL 378 overcharges, a number of factors specific to the operations of that refiner must be analyzed. We know of no methodology that would accomplish analyses of those factors, and no party in this proceeding has suggested such a methodology. Marginal economic analysis analyzes industry-wide data and produces results which estimate the *average* amount of cost absorption by refiners as a class. The impact sustained by individual refiners will, of course, vary from the industry-wide average.

The comparable paragraph in the of non-public April 1 draft report is shorter. It states (p. 73):

> Each of the methods presented for our use to determine who bore the impact of the MDL 378 overcharges is subject to valid criticisms. One of those methods – refiner per-barrel profit analysis – is not relied upon in this determination, except as part of the "big picture." The analysis of refiner cost banks is relied upon only to the extent that the absence of cost banks indicates complete passthrough of the impact of MDL 378 overcharges. We find that the use of marginal economic analysis with econometric estimation techniques provides the best possible indication of the extent to which the domestic refining industry bore the impact of the MDL 378 overcharges. Unlike the other methods suggested by some parties, marginal economic analysis answers the appropriate question in this proceeding, namely, to what extent did product prices rise when the refining industry experienced a small crude oil cost increase. It also yields precise numbers with a high level of confidence.

Whether these and other changes in words and emphasis are "substantial" or not is a question for all to judge (particularly the Court), not just the Department of Energy (DOE). You are asking the Court, the parties, the public and this Subcommittee to accept your judgment on faith of what is substantial. But your judgment is colored by your desire to have your policy adopted. By keeping the contents of the draft locked up at DOE, you want to leave all in the dark as to alternatives. I believe the Court and the public, not you, should decide this matter.

I point out one word change in the above paragraphs

that, I believe, changes the emphasis significantly. The fifth sentence of the both paragraphs is virtually identical.The difference lies with a change of an article "an" to "the". Thus, the public report states the "marginal economic analysis answers *an* appropriate question", while the draft states it "answers *the* appropriate question". Is that "minor"? Is the "substance exactly the same"? The court could easily conclude "No it is not," particularly in light of other changes in the paragraph.

There are other significant changes in the findings. Most importantly, chapter V (deleted in the final version) indicates the standards used by the OHA in its fact-finding. Your letter does not discuss that deletion. I feel certain that the Court, the parties, and the public would welcome this information and consider it "substantial" to the fact-finding.

Second, you state:

> Whatever few changes made to the substance of the factual determinations as OHA proceeded from the April 1 Draft to the final Report were made entirely within OHA and without review, approval or other such involvement by persons outside OHA. I am assured by the Director of the OHA that the findings of fact were made in strict compliance with the Court's May 7 Order.

Clearly, there were far more than a "few changes" to the entire report, even though all such changes were, as you state, "technically" made "within OHA". While I am certain that the OHA Director honestly believes that the findings were "in strict compliance" with the Order, the fact remains that between April 1 and May 7, the DOE had ample opportunity, as your letter shows to "influence" the changes. The May 7 and 10 meetings were clearly fresh in

the OHA Director's mind when the changes were made. The die was cast by the time you and he learned of the May 78 Order. DOE did not like OHA's report or any recommendation for further proceedings. The treasury solution was the DOE policy. The report needed change to allow that policy. Indeed, *all* of the changes seem to coincide neatly with that view as expressed in your June policy statement. By indirection, the OHA Director re-worked the draft to make it bland and "in synch" with your "policy".

Third, your letter interprets the Court's May Order very conservatively by saying: "Given the Court's May 7 Order, such recommendations and policy decisions simply had no place in the fact-finding report." Earlier your Department bent over backwards to interpret the Court's first Order liberally as giving DOE wide leeway to review the report and make changes.

However, the May 7 Court Order did not change the earlier Order of the Court where, as noted by OHA in the draft report, the Court said it "will also welcome the views of the OHA on how restitution can best be achieved in this case." The Court encouraged OHA to make recommendations or views on restitution. OHA did so in the draft report which you are seeking to withhold from the Court and the public. The May 7 Order supplemented the 1983 Order. It did not change it. It made clear, however, that review and change by DOE was improper.

In the May 7 Order, the Court said:

> This Court referred this legislation to the OHA only to take advantage of the procedures and expertise which the OHA had developed in tracing the impact of overcharges on the oil industry.

> This litigation was referred to the OHA for its determination of which parties had suffered injury in what amounts. That determination is solely a question of fact. *The Court did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution, although the Court is interested in the DOE's position on these matters.* (Underlining supplied)

Chapter VIII of the April 1 draft OHA report states:

> *The following sections present a restitutionary mechanism to implement the factual findings cotained in this determination which we believe is administratively workable.* The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can be accepted promptly upon announcement of a payment proceeding. We recognize that his undertaking will require the dedication of significant resources. *If directed by this Court, the Office of Hearings and Appeals is ready to assist in this endeavor.* (Underlining Supplied)

While the Court may disagree, I believe that the OHA recommendation is, in effect, an OHA view on "how to actually make restitution", based on its fact-finding. So long as you refuse to allow OHA to release its draft, the Court will never have the opportunity to agree or disagree. Again I urge that, as a minimum, you release the April 1 draft to the Court. Let the Court decide its value.

Since receiving your September 19 letter, I received the enclosed September 12 Order by Judge Frank G. Theis. Strangely, you mention that the "question of whether the April 1 Draft should be made available to the parties is now before the Court on a discovery motion," but you did not mention the September 12 Order. Please provide a copy of your reply to that Order.

In view of the fact that the Court is now aware of the April 1 draft and has issued the September 12 Order, I will not, at this time, release the draft report. I am not, however, convinced by your arguments for non-disclosure and will probably release the draft report if you do not furnish it to the Court pursuant to the September 12 Order. I believe your reasons for wanting to retain "confidentiality" have nothing to do with protecting even a modicum of the "deliberative process", but are aimed at preserving your Federal deficit cutting, non-restitutionary policy of last June. The so-called "deliberative process' would *not* "be seriously impaired" by disclosure of the draft to the Court. In fact, the extent to which the April 1 draft was widely circulated within the DOE, (in violation of the Court's Order of 1983) makes a mockery of that process, particularly insofar as you equate the OHA process with that of a "Special Master." I have never known a Special Master to have his drafts reviewed extensively by persons not under with the Special Master.

In your reply on page 3 of your letter, you state there were "numerous meetings" to discuss the report and the "Statement of Restitutionary Policy". When was that policy prepared and first circulated? Who received it? Was a draft of it provided in any form to the OHA Director at the May 7 or 10 meetings? When was the Director first

made aware of the policy? What were the nature of the May 7 and 10 discussions which you attended?

Finally, I note your continued refusal to file my letter with the Court. You state:

> Courts have repeatedly held that the views of individual members of Congress, even if they are committee chairmen, are to be given no weight in construing or applying Federal law, except as they may be part of pre-enactment commentary on legislation being enacted, so that the Courts can discern the views of the Congress as a body at the relevant time of its adoption of legislation.,

If this is so, then I wonder why you have declined to make my views known to the Court. If, as you state, the Court will give my views on DOE policy "no weight," so be it. There can be no harm to DOE in providing them so they will be before the Court. The Court, of course, is free to reject, ignore, or consider them.,

You note that one of the parties attached a copy of my September 3 letter with their motion. That is interesting. However, I prefer that the Government, not a private party, as a courtesy provide my views to the Court. I do not think it unreasonable to ask that you extend this courtesy to me or any other Member of Congress.

I again urge that you release the April 1 draft to the Court and that you provide my letters to the Court, including this letter.

I request your reply by October 7, 1985.

Sincerely,

/s/ John D. Dingell
JOHN D. DINGELL
Chairman
Subcommittee on
Oversight and Investigations

Enclosure (1)

cc: Honorable James T. Broyhill
Ranking Minority Member

Honorable John S. Herrington, Secretary
Department of Energy

Mr. Marshall Staunton, Acting Administrator
Economic Regulatory Administration
Department of Energy

Honorable George B. Breznay, Director
Office of Hearings and Appeals
Department of Energy

Honorable Charles A. Bowsher, Comptroller
General Accounting Office